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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 232

W. BROWN MORTON, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the Tax Court (R. 7–12) is not reported. The opinion of the Court of Appeals (R. 27–30) is reported at 174 F. 2d 302.

JURISDICTION

The judgment of the Court of Appeals was entered on April 22, 1949 (R. 30); a petition for rehearing was denied May 9, 1949 (R. 34). The petition for a writ of certiorari was filed August 4, 1949. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether on the evidence the Court of Appeals properly affirmed the Tax Court's decision that petitioner, a successful New York attorney, was not entitled to an income tax deduction for expenditures made in 1942 and 1943 in connection with his Virginia farm, which were claimed to be deductible as expenses paid in carrying on the business of farming within the meaning of Section 23 (a) (1) (A) of the Internal Revenue Code, or for the management, conservation, or maintenance of property held for the production of income within the meaning of Section 23 (a) (2) of the Code.

STATUTE AND REGULATIONS INVOLVED

These will be found in the Appendix, *infra*, pp. 11–12.

STATEMENT

This case concerns petitioner's claim of allowable income tax deductions, for the years 1942 and 1943, for expenditures made in connection with a farm owned by him. The facts found by the Tax Court (R. 5–7) are as follows:

Petitioner, during all years material herein, was a resident of New York City and was engaged in the practice of law therein. He devoted all of his time to his profession except for occasional vacations, usually of short duration, and week-ends. In 1942, his earnings from his law

partnership were $55,901.33, and in 1943, $53,964.06. (R. 5.)

In May, 1929, he acquired real estate at Osso in King George County, Virginia. This property included approximately 300 acres of land in two separate tracts of approximately equal size. One hundred acres was cleared and the balance was woodland. There was a 12-room dwelling house, a tenant's house and a servant's house each containing four rooms and a bath. The farm also contained barns, chicken houses, an ice house, a smoke house, a pump house and a four-car garage. (R. 5–6.)

Petitioner purchased the farm in 1929 with the expectation of retiring from practicing law at some time in the future. The occurrence of the depression shortly thereafter caused him to give up his plan for retirement. (R. 7.)

Petitioner's family usually spent the summer at the farm and made short visits there at Christmas, Easter and other holidays. Petitioner joined his family whenever possible. On these visits such produce as was grown on the farm was used on the family table. (R. 6.)

From 1929 to 1932, a tenant farmer operated the farm but no profits are in evidence. Thereafter, a friend of petitioner moved into the tenant house and remained on the place until early in 1942. He farmed part of the farm and kept all that he raised. He used his own stock and implements and petitioner paid nothing but the taxes.

(R. 6.) From 1932 through 1942, no farming operations occurred in which petitioner was financially interested. (R. 6.)

In 1942, petitioner entered into a share-cropping contract with a new tenant whereby petitioner furnished all seed, equipment and working stock, and the tenant furnished the labor. Petitioner received no income under this tenancy. During this period petitioner employed a caretaker for wages and living quarters. The caretaker also worked on the upkeep of the farm. (R. 6.)

No produce was sold in 1942, and in 1943 fruit to the value of $275 was sold. (R. 7.)

Petitioner's farm expenditures during the taxable years were as follows (R. 6):

	1943	1944
Labor	$ 1,545.45	$ 1,696.63
Material and supplies	752.23	553.23
Insurance	561.66	513.35
Repairs		426.12

The farm has shown a loss for each year since it was acquired by petitioner. The only time he devoted to farming was in giving occasional instructions to the man on the place. (R. 7.) In 1944, petitioner sold the separate tract on which the main farmhouse was not located, and has since raised some cut flowers for the New York and Washington markets. (R. 70.)

On the basis of these facts, the Tax Court found that petitioner was not engaged, and did not intend to engage, in the business of farming

nor was he engaged in farming for a profit, and the amounts which he expended in 1942 and 1943 were not ordinary and necessary expenses paid or incurred in the production of income, nor for the management, conservation or maintenance of property held for the production of income. (R. 7, 8–11.) Accordingly, the Tax Court held that the expenditures made by taxpayer in 1942 and 1943 in connection with the farm are not deductible expenses under Section 23 (a) (1) (A) or (a) (2) of the Internal Revenue Code. (R. 7–12.)

The Court of Appeals affirmed the Tax Court, holding that its findings were not clearly erroneous. (R. 27–30.)

ARGUMENT

This case does not warrant further review. Contrary to the petitioner's assertion (Pet. 4), there is no general problem of law presented. The issues before the Tax Court were factual in character and its decision, challenged in the Court of Appeals and confirmed there, was merely a matter of resolving conflicting claims as to the taxpayer's purpose in carrying on his farming activities. Two courts have now examined the evidence and concluded alike; there would seem accordingly no justification for consideration anew by this Court. *District of Columbia* v. *Pace,* 320 U. S. 698, 701; *United States* v. *O'Donnell,* 303 U. S. 501, 508.

1. In reviewing the Tax Court's decision, the Court of Appeals properly applied the requirement of Rule 52 (a) of the Federal Rules of Civil Procedure that the lower court's "findings of fact shall not be set aside unless clearly erroneous."[1] Judge Swan's opinion makes amply clear that the appellate court felt no circumscription of its power to examine the evidence, and to come to a different conclusion from that of the Tax Court were it definitely persuaded that error had been committed by the trial court with respect to the ultimate facts, especially those as to the taxpayer's purpose and intention on which the case turns.[2] Consequently, there is no basis for petitioner's plea (Pet. 6) of an improper application of the Rule, or of a conflict among the circuits. The prin-

[1] Rule 52 (a) was made applicable to review of Tax Court decisions by Section 36 of the Act of June 25, 1948, c. 646, 62 Stat. 869 (26 U. S. C., Supp. II, 1141), amending Section 1141 (a) of the Internal Revenue Code.

[2] The Court of Appeals said first (R. 28):

"In the case at bar the Tax Court concluded, after reviewing the facts, that the taxpayer was not engaged in the business of farming. This finding is amply supported by the record."

and then proceeded to outline in some detail the evidence supporting the Tax Court's conclusion (R. 28). Later in its opinion, it stated that it considered as "justified" the Tax Court's "conclusion" that the "taxpayer maintained this farm as a country home for himself and family and that such expenditures as he made for the operation of the farm were for the preservation of that home rather than for the making of profits." (R. 29.)

ciples announced in *Murray* v. *Noblesville Milling Co.*, 131 F. 2d 470 (C. A. 7), and *Ball* v. *Paramount Pictures*, 169 F. 2d 317 (C. A. 3), which petitioner cites (Pet. 6), are fully harmonious with that applied in the instant case, rather than in conflict. And there certainly is no need, in a case of this type, for this Court again to define the scope of Rule 52 (a); it has done so as recently as last year. *United States* v. *Gypsum Co.*, 333 U. S. 364, 394–395, rehearing denied, 333 U. S. 869.

2. Nor is there merit to the contention (Pet. 4, 7) that the Court of Appeals applied the principle of Rule 52 (a) to an allegedly erroneous *legal* conclusion of the Tax Court, i. e., that the lack of profits during the period preceding the tax years, in which period the farm was admittedly not operated as a business, was relevant to petitioner's business intent or lack thereof in respect of his 1942 and 1943 farming operations. Again, the Court of Appeal's opinion clearly shows (R. 29) that it gave fresh consideration to the question of the materiality of the evidence that there was constant and continual loss over a series of years. "The intent of the taxpayer in making his expenditures is what counts", the court said, "* * * continuing lack of profits is an important factor bearing on the taxpayer's true intention". (R. 29.) That is assuredly the law. *Cecil* v. *Commissioner*, 100 F. 2d 896, 899 (C. A. 4); *Commissioner* v. *Field*, 67 F. 2d 876,

878 (C. A. 2); *Deering* v. *Blair*, 23 F. 2d 975, 976 (C. A. D. C.); *Thacher* v. *Lowe*, 288 Fed. 994 (S. D. N. Y.). The materiality of the loss record of the period preceding the tax years lies in its tendency to show that profit was not reasonably to be expected, leading to the fair inference that the taxpayer did not in the tax years intend to own and operate the farm for the purpose of gain. *Thacher* v. *Lowe*, *supra*.[3]

3. Moreover, even without the evidence in this case that the farm was from the outset a losing venture, the record contains more than ample substantiation for the conclusion of the Tax Court and the Court of Appeals that petitioner was neither engaged in farming for profit during the tax years nor did he consider this property as being then held for the production of income. Indeed, the petitioner's own testimony is effective demonstration that the expenditures in question were not profit-induced but were made, as the Tax Court said (R. 11), for the maintenance and preservation of the farm as a country home.[4]

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[3] See also *Smith* v. *Commissioner*, 9 T. C. 1150, cited by petitioner (Pet. 13–14), where not only losses preceding the tax years but also losses subsequent to the tax years were considered by the Tax Court as bearing on that taxpayer's intention to operate his farm for profit.

[4] The following excerpts from petitioner's testimony are illustrative (R. 21):

"Q. What kind of buildings were there on the property?

"A. Well, on the property where the tenant lived, there was a tenant house and barn and chicken houses, and the usual houses of that kind; and on the other property there

By statute, personal, living, and family expenses are nondeductible items; under the Regulations,

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was the main house, our summer residence, a tenant house, a servant's house, a barn, ice house, smoke house, four-car garage, and a pump house.

"Q. How much of the time during the years 1942 and 1943 did you occupy the premises?

"A. During both the summer of 1942 and 1943 my wife was there during practically the entire summer because our boys were overseas and my daughters-in-law and children spent the summer there. * * *"

Again (R. 21, 22, 24):

"Q. What kind of farm equipment did you have on that farm?

"A. Well, I had a truck, a tractor, mowing machine, a wagon, a hayrack, and a general road machine. There is a long narrow strip of lane, instead of a regular road, which is about a mile and a half from the house to the main road, and we have to maintain our own roads there, and I had a road machine in addition to the usual farming equipment.

* * * * *

"Q. In 1942 were there any farming operations conducted during that year?

"A. In 1942 we raised some corn and some hay and put in some potatoes, but we could not get labor to dig them and most of them spoiled. I might say that in 1942 things had grown pretty bad, and we were more engaged in getting things cleared up, although we did put in enough corn and hay, we thought, to take care of our own stock, but not with an idea of a money crop.

* * * * *

"Q. And you claimed to operate this farm, as I understand it, as a business. I ask you in 1942 and 1943 why did you continue to carry the farm alone as a business when you had repeated losses?

"A. Well, a piece of property like that, if you don't try to farm it, it goes to 'pot' very quickly. You have either got to farm it or sell it, if you want to do anything with it, * * *."

the validity of which is certainly not subject to question, amounts paid in connection with the management, conservation, or maintenance of property held for use as a residence are not deductible.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER, 1949.

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[5] Internal Revenue Code, Section 24 (a) (1) (Appendix, *infra*, p. 11); Treasury Regulations 111, Sec. 29.23 (a)–15 (b), as amended by T. D. 5331, 1944 Cum. Bull. 98 (Appendix, *infra*, p. 12).

APPENDIX

1. Internal Revenue Code:

SEC. 23 [as amended by Sec. 121 (a) of the Revenue Act of 1942, c. 619, 56 Stat. 798]. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

(a) *Expenses.*—

(1) *Trade or business expenses.*—

(A) *In general.*—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, * * *

* * * * * *

(2) *Non-trade or non-business expenses.*—In the case of an individual, all the ordinary and necessary expenses paid or incurred during the taxable year for the production or collection of income, or for the management, conservation, or maintenance of property held for the production of income.

* * * * * *

(26 U. S. C. 23.)

SEC. 24. ITEMS NOT DEDUCTIBLE.

(a) *General Rule.*—In computing net income no deduction shall in any case be allowed in respect of—

(1) Personal, living, or family expenses;

* * * * * *

(26 U. S. C. 24.)

2. Treasury Regulations 111, promulgated under the Internal Revenue Code:

SEC. 29.23 (a)–11. *Expenses of Farmers.*—A farmer who operates a farm for profit is entitled to deduct from gross in-

come as necessary expenses all amounts actually expended in the carrying on of the business of farming. * * *

SEC. 29.23 (a)–15 [as amended by T. D. 5331, 1944 Cum. Bull. 98]. *Nontrade or Nonbusiness Expenses.*—(a) *In general.*—Subject to the qualifications and limitations in chapter 1 and particularly in section 24, an expense may be deducted under section 23 (a) (2) only upon the condition that:

(1) it has been paid or incurred by the taxpayer during the taxable year (i) for the production or collection of income which, if and when realized, will be required to be included in income for Federal income tax purposes, or (ii) for the management, conservation, or maintenance of property held for the production of such income; and

(2) it is an ordinary and necessary expense for either or both of the purposes stated in (1) above.

* * * * *

(b) Except for the requirement of being incurred in connection with a trade or business, a deduction under this section is subject to all the restrictions and limitations that apply in the case of the deduction under section 23 (a) (1) (A) of an expense paid or incurred in carrying on any trade or business. This includes restrictions and limitations contained in section 24. * * *

* * * * *

Ordinary and necessary expenses paid or incurred in connection with the management, conservation, or maintenance of property held for use as a residence by the taxpayer are not deductible.

* * * * *

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